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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIE CLYDE HARRIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Under Rule 19(1)(b):	
The United States Court of Appeals for the Seventh Circuit has acted in this matter directly contrary to a decision of the United States Supreme Court, *Gonzales* v. *United States*, 348 U.S. 407 (1955):	
(1) May a local board fail to give notice of the recommendation of the Justice Department on the matter of classification, to the registrant, or misdirect it to the wrong address (after being notified of the change, and the defendant having testified that he failed to receive it)? Or does failure on the part of the local board deny to the defendant his right to a meaningful appeal?	5
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Willie Clyde Harris, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on July 27, 1971, Petition for Rehearing denied August 20, 1971.

CITATION TO THE OPINION BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit printed in the Appendix, infra, Appendix page 1, is unreported at the present.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Seventh Circuit was entered on July 27, 1971. A timely Petition for Rehearing was filed on August 10, 1971. The Petition for Rehearing was denied on August 20, 1971. This Petition for Writ of Certiorari will be timely filed on or before September 20, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. The Trial Court and the United States Court of Appeals for the Seventh Circuit have acted in this matter directly contrary to the decision of this Court in *Gonzales* v. *United States,* 348 U.S. 407 (1955) in holding that the lack of notice of the recommendation of the Justice Department did not deny the defendant his right to a meaningful appeal.

2. The Trial Court and the United States Court of Appeals for the Seventh Circuit have decided an important question of federal law which has not been, but should be, considered by this Court; that is, does a local board have authority to induct a registrant who has no notice of his classification status?

STATEMENT OF THE CASE

This criminal action is based upon an indictment which charged the defendant with refusing to report for civilian work in violation of 50 App. U.S.C. 462.

Mr. Harris, as a duly ordained minister of Jehovah's Witnesses, timely filed an appeal from the I-A-O Classification issued on March 16, 1965. The Appeal Board reviewed his file and tentatively determined to refuse to

reclassify Mr. Harris IV-D or I-O. The registrant was not notified of this tentative decision.

Thereafter, on August 3, 1965, the Appeal Board forwarded the registrant's file to the Justice Department for their review. On November 20, 1967, while his file was still pending before the United States Department of Justice, Mr. Harris filed a written notice of a change of address with Local Board No. 79.

The Justice Department returned the file to the Appeal Board on February 15, 1968, two and one-half years after receiving the file, and recommended that the registrant be classified I-O. As the Appeal Court has pointed out, their recommendations contained no comments on the legitimacy of the registrant's IV-D claim.

The Board attempted to forward a copy of the Justice Department's report to the registrant, but erroneously overlooked the change of address which had been filed and mailed the report to Mr. Harris' old address. Included with the misdirected report was a letter stating that Mr. Harris had thirty days in which to submit additional information, and, if none was submitted, that the Appeal Board would act pursuant to the Justice Department's recommendations.

Mr. Harris never received that letter, nor its attachment from the Department of Justice, nor any other notification that a I-O Classification was being recommended. Moreover, Mr. Harris was never notified that a I-O Classification had been issued. (Transcript, pp. 7, 8, 9, 33-37, 52, 76 and 77).

The Local Board mailed the new S.S.S. 110 Notice of Classification on February 19, 1968. Four days later they mailed an S.S.S. 127, a current information questionnaire, also addressed to the wrong address. Thereafter, the Local

Board sent out letters to three of the registrant's acquaintances in an attempt to determine his current address.

All mailings subsequent to May 31, 1968 were delivered to the address which Mr. Harris had filed six months before and which the Local Board had previously erroneously overlooked. Without attempting to determine whether Mr. Harris had received any of the extremely crucial information and instructions sent between November 20, 1967 and May 31, 1968, and without attempting to inform the registrant of his current Selective Service classification status, the Local Board began processing the registrant for civilian work.

On June 1, 1968, Mr. Harris received an Order to Report for a physical. This was the first communication the registrant received since he filed his appeal in March of 1965.

Mr. Harris appeared at the examining station on the day appointed. He has testified that a clerk separated him from the rest of those being examined and informed him that he was physically unqualified. The D.D. 62 form in the registrant's file, however, indicates that he passed his physical.

Thereafter, Mr. Harris was ordered to report for civilian work, and he was subsequently convicted for refusing to obey this order.

The defendant timely filed Notice of Appeal to the United States Court of Appeals for the Seventh Circuit and on July 27, 1971 the Seventh Circuit rendered its opinion affirming the Trial Court. Application for rehearing was timely made and was denied on August 20, 1971.

This Petition for Writ of Certiorari will be timely filed on or before September 20, 1971.

REASONS FOR GRANTING WRIT

I.

THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAVE ACTED IN THIS MATTER DIRECTLY CONTRARY TO THE DECISION OF THIS COURT IN GONZALES v. UNITED STATES, 348 U.S. 407 (1955) IN HOLDING THAT THE LACK OF NOTICE OF THE RECOMMENDATION OF THE JUSTICE DEPARTMENT DID NOT DENY THE DEFENDANT HIS RIGHT TO A MEANINGFUL APPEAL.

This Court, in *Gonzales* v. *United States,* 348 U.S. 407 (1955) ruled unequivocally that one seeking a reclassification has an absolute right to review the recommendation of the Department of Justice in order to make a meaningful appeal. The Court explained its position as follows:

> " . . . we believe it also to be implicit in the act and regulations — viewed against our underlying concepts of procedural regularity and basic fair play — that a copy of the recommendation of the Department be furnished the registrant at the time it is forwarded to the Appeal Board, and that he be afforded an opportunity to reply." (348 U.S. at 412).

The Court went on to state that:

> "An opportunity for the registrant to reply is, therefore, the only means of insuring that this board will have *all* of the relevant data. Furthermore, if the registrant is to present his case effectively to the Appeal Board, he must be cognizant of all the facts before the Board as well as the overall position of the Department of Justice." (348 U.S. at 413).

> "The Petitioner was entitled to know the thrust of the Department's recommendation so he could muster his facts and arguments to meet its contentions." (348 U.S. at 414).

In the case at hand, Mr. Harris was never notified of the recommendation of the Justice Department, nor of the fact that he had thirty days to add information before the Appeal Board would act pursuant to the recommendation and classify him I-O.

The Court of Appeals concluded that the recommendation of the Justice Department was essentially favorable to the defendant, that the report did not pass on the IV-D claim, and that lack of knowledge of these recommendations was not prejudicial.

A review of the facts of this situation clearly leads to a contrary conclusion:

> (1) Had the registrant known that his IV-D claim had never been considered, he would have immediately sought to submit more information in support of his claim during the thirty days allotted for this purpose.

The *Gonzales* decision would indicate that only in extremely unusual circumstances would the Board be relieved of the responsibility to notify a registrant of Justice Department recommendations. Such a case might arise when the Department recommended the lowest classification requested by the registrant, and the Appeal Board granted this classification. In all other cases the recommendations of the Justice Department must be considered prejudicial, since *the granting of one classification necessarily entails the rejection of any request for a lower classification.*

The Second Circuit has recognized the logic of this argument. In *United States* v. *Purvis,* 403 F.2d 555 (2nd Cir. 1968), the Court held that notice of the Justice Department

recommendations were required even though they suggested that the registrant be classified I-A-O. Purvis had requested a I-O.

Ultimately, any recommendation other than the lowest classification requested is prejudicial since upon receiving notice the registrant could immediately attempt to buttress his rejected claim with supporting information before the Appeal Board made its final decision. The Board's erroneous mailing of the Justice Department's recommendations has denied Mr. Harris this opportunity.

> (2) The registrant "must be cognizant of all the facts before the board as well as the overall position of the Department of Justice." (*U. S.* v. *Gonzales,* Supra, at 413).

Fundamental principles of the Anglo-American legal tradition require that an individual asserting a claim against a government agency be advised as to any policies or reasoning on which the rejection of that claim might be based. The Fifth Amendment of the United States Constitution has formalized this philosophy and labeled it "due process of law". Mr. Harris has been denied this due process since the erroneous mailing of the Justice Department's recommendation prevented him from discovering the reasoning that led to his classification.

As was stated in *United States* v. *Cummins,* 425 F.2d 646 (8th Cir. 1970), in a case where the State Director took an appeal and the registrant was not notified,

> "Every citizen, including youthful registrants, under the Selective Service laws, is entitled to be substantially informed as to any government action which may affect his liberty or life. No government procedure may stand which fails to provide such information. To be both fairly and timely advised is funda-

> mental to the basic concepts of due process. 'Clandestine due process' has never found favor of constitutional basis in courts of law."

The thrust of *Gonzales* and *Cummins* leads to the conclusion that the lack of notice of the reasoning behind a decision constitutes a denial of due process. Without such notice neither the registrants nor the court can determine whether the decision was based on valid criteria. (*Dickinson* v. *U. S.*, 346 U.S. 389 (1953); *U. S.* v. *Haughton*, 413 F.2d 736 at 739 (9th Cir. 1969); *U. S.* v. *St. Clair*, 293 F. Supp. 337 at 341 (E.D.N.Y. 1968), and *U. S.* v. *Lemmens*, 430 F.2d 619 (7th Cir. 1970).

In the case at hand, Mr. Harris never was given any reasons for the rejection of his IV-D claim, nor was he notified of the reasoning behind his I-O Classification since he never received a copy of the Justice Department's recommendations. Under the circumstances, where the classification sought was lower than that ultimately issued, the defendant was denied due process in the channels of the Selective Service System by the fact that an administrative error sent the recommendation of the Justice Department to the wrong address, effectively depriving the registrant an opportunity to review the reasoning behind his I-O Classification of the rejection of his IV-D claim. The Appellate Court's finding that the IV-D claim was not even considered by the Justice Department suggests that the lack of notice was substantially prejudicial, since Mr. Harris certainly had a right to have this claim heard by the Appeal Board.

II.

THE TRIAL COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, CONSIDERED BY THIS COURT; THAT IS, DOES A LOCAL BOARD HAVE AUTHORITY TO INDUCT A REGISTRANT WHO HAS NO NOTICE OF HIS CLASSIFICATION STATUS?

It is immediately obvious that the Local Board could not induct a registrant without notifying him of his original classification, since to do so would deny him of his right to a personal appearance and an appeal. It is equally obvious that a registrant cannot be inducted while an appeal is pending.[1] The question here, however, is can a registrant be inducted after his appeal has been denied but before he has been notified of the outcome?

It is the clear intent of the regulations that the registrant should be notified of the outcome of his appeal. 32 C.F.R. Sec. 1626.31 provides that after receiving notice of the Appeal Board's decision the Local Board should "(a) Mail a Notice of Classification to the registrant . . . ". Without this notice, the registrant would naturally assume that his appeal was still pending. Mr. Harris made just that assumption. (Transcript at pp. 43, 51-53).

By erroneously mailing the registrant's new classification card to the address which Mr. Harris had reported changed six months before, the local board led the defen-

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[1] 32 C.F.R. Sec. 1626.41 provides that any induction order issued by the board while an appeal is pending is ineffective and should be cancelled. 32 C.F.R. Sec. 1660.20(d) incorporates this provision and makes it applicable to a I-O with an appeal pending.

dant to believe that he was being ordered to report for civilian service while still classified I-A-O and with an appeal pending. This administrative irregularity would naturally lead the registrant to believe that:

(1) As a I-A-O he could at any time be ordered to report for alternate non-combatant service in the military rather than a hospital.

(2) He was issued an invalid order since his appeal was still pending.

The Court of Appeals passed squarely on the issue and held that they were "unable to perceive any prejudice to the appellant resulting from the mailing of the erroneously addressed communications in question." This conclusion is unwarranted in the light of the facts of this case since the defendant has clearly been prejudiced in the following manner:

(1) Since Mr. Harris thought his appeal was pending he did not attempt to resolve what he considered to be an error in the report of his physical examination.

If the defendant had known that his appeal had been resolved against him, he would have explained to the Local Board that Afees had erred in marking his card, he would have supported his contentions with supplementary documentations of his ailments, and he would have petitioned the Local Board for a re-evaluation of his physical condition. If the Board felt that the registrant's claim was justified, they would have forwarded him to another medical interview pursuant to the instructions of Local Board Memoranda Number 113 and 121. But Mr. Harris never bothered to pursue this claim, since he knew he would still have thirty days after his appeal was filed to submit new information.

(2) Had the defendant known he was classified I-O rather than I-A-O and could not be ordered to report for military service he might have reported for civilian hospital work.

The possibility of an order to serve in non-combatant active duty would have required Mr. Harris to compromise his religious principles if he decided to report to the hospital under these conditions. An order under a I-O Classification would not have required such a great compromise. But, Mr. Harris was never given enough information to know that it was a I-O order which he was refusing. And he was subsequently convicted for rejecting a choice which he never had.

(3) If the defendant had known his IV-D claim had been rejected he could have added evidence to his file which would have required the board to reopen and reconsider his claim.

This was an extremely important alternative since two and one-half years had lapsed since the claim had originally been submitted. The legitimacy of a IV-D claim depends to a large extent on the leadership role one develops in his religious community. Naturally, as Mr. Harris matured he would begin to assume a more active adult role in his congregation of Jehovah's Witnesses. Consequently, his ministerial teaching, preaching and proselytic activities would become more similar to that which the Local Board would characterize as a vocation. The fact that he could have submitted this information at any time is not relevant, since up until the day of trial, when the registrant realized he had been classified I-O, he had no reason to believe his original claim was insufficient.

(4) The Local Board's failure to advise Mr. Harris of his classification status caused him to forego various administrative remedies which would have otherwise been available.

32 C.F.R. Sec. 1626.61(a)(b) provides for a discretionary reopening upon the request of the State Director. If the defendant thought his claim valid, he could have written the State Director himself or sought aid from the Local Board appeal agent. Under the circumstances, however, Mr. Harris had no reason to ask for this discretionary remedy since, not having been notified of the outcome of his appeal, he had no indication that his file was ever closed by the Appeal Board.

Since the lack of notification effectively precluded the registrant from seeking numerous other forms of administrative relief by lulling him into a false sense of security with the impression that his appeal was still pending, the Local Board's mailing error has indeed been prejudicial.

Moreover, a lack of notice of the result of an appeal must necessarily always be prejudicial, since without such notice a registrant would have no indication that the time to seek discretionary remedies was upon him. Whether these remedies would ultimately satisfy the registrant is certainly not an issue at this time. The point is that these methods were authorized by Congress with the obvious intention that they be utilized. Any local board action which would frustrate this intent, effectively blocking this access to a rehearing constitutes a denial of the due process mandated by the Fifth Amendment of the United States Constitution.

CONCLUSION

It is respectfully submitted that this Court should issue its Writ of Certiorari in order that it may consider the important questions concerning a local board's authority to induct one who has not been notified of his classification status and concerning the registrant's claim that lack of notice of the Appeal Board's actions and the Justice Department's recommendation denied him the due process of law mandated by the Fifth Amendment of the United States Constitution.

Respectfully submitted,

KENNETH S. JACOBS
Attorney for Willie Clyde Harris,
Petitioner

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1970 — APRIL SESSION, 1971

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 18569 vs.

WILLIE CLYDE HARRIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

July 27, 1971

Before KNOCH, *Senior Circuit Judge,* PELL, *Circuit Judge,* and GORDON, *District Judge.*[1]

GORDON, *District Judge:* The appellant, Willie Clyde Harris, was found guilty after a bench trial of having failed to report as a Class I-O registrant for civilian work at the Elgin State Hospital, Elgin, Illinois, in violation of 50 App. U.S.C. 462.

[1] The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

In both his motion for acquittal before the district court and in his principal brief before this court, Mr. Harris argued numerous contentions against his conviction; however, in his oral argument before this court, his counsel relied almost exclusively upon a proposition which was not advanced until he filed his reply brief. The government has moved to strike the latter contention which concerns Mr. Harris' claim that his local board failed properly to record his change of address and that as a result, Mr. Harris was not notified of the recommendation of the United States Department of Justice that Mr. Harris' classification be changed from I-AO to I-O. Later, when the local board carried out this recommendation and transmitted the I-O classification to Mr. Harris, it was sent to his old address.

The government suggests that the tardy submission of this argument would warrant our striking it under Rule 10 of this court's rules. See *Finsky* v. *Union Carbide and Carbon Corp.*, 249 F.2d 449, 459 (7th Cir. 1957), cert. denied 356 U.S. 957 (1958). Nevertheless, in the interest of justice, we consider that it is more appropriate that we resolve the contention made and, therefore, we deny the motion to strike.

Upon the merits of the argument, we conclude that we are unable to perceive any prejudice to the appellant resulting from the mailing of the erroneously addressed communications in question. Mr. Harris had sought the I-O classification, and the recommendation of the Department of Justice (of which he was not notified) was essentially a favorable finding to him; it can scarcely be said that he was prejudiced by not having been more promptly apprised of this recommendation. Similarly, the board's issuance of a new draft card granting him a I-O classification was not prejudicial to Mr. Harris merely because it was mailed

to the wrong address. See *United States ex rel. McCarthy* v. *Cook*, 225 F.2d 71 (3d Cir. 1955), cert. denied 350 U.S. 937 (1956); *Lancaster* v. *United States*, 153 F.2d 718 (1st Cir. 1946).

Mr. Harris contends that his application for ministerial status was rejected upon the recommendation of the Department of Justice, and that had he known of this, he could have taken steps to challenge it. While it is true that the registrant filed a claim for ministerial status in October, 1964, the review by the Department of Justice on February 15, 1968 does not purport to pass on that issue. The opening paragraph of the Department's letter of February 15, 1968 refers to the fact that " . . . an opportunity to be heard on his claim for exemption as a conscientious objector is given the registrant by Mr. Leonard Rose, a Hearing Officer for the Department of Justice." The conclusion of the letter is as follows:

> "The Department of Justice concludes that the registrant's conscientious-objector claim is sustained and recommends that he be classified in Class I-O."

In essence, the Department of Justice addressed itself to the conscientious objector claim and not to Mr. Harris' application for ministerial status.

Although the foregoing issue regarding the absence of notice to the registrant was urged as the principal basis for reversal, there are a number of other contentions advanced in the original brief which we shall also examine.

The appellant urges that he was denied his sixth amendment right to confront the witnesses against him when his selective service file was admitted into evidence over his objection. Particular criticism is directed at the receipt of a letter contained in the selective service file, dated February 17, 1969, which asserts that Mr. Harris "did not

report to duty at the Elgin State Hospital on February 10, 1969. . . . " for the purpose of performing civilian work. In *United States* v. *Holmes,* 387 F.2d 781 (7th Cir. 1967), cert. denied 391 U.S. 936 (1968), this court held that the receipt of a defendant's selective service file into evidence in a prosecution for his failure to report for civilian work at a state hospital did not violate the defendant's constitutional right to confront his witnesses. See also *Pardo* v. *United States,* 369 F.2d 922 (5th Cir. 1966); *United States* v. *Borisuk,* 206 F.2d 338 (3d Cir. 1953); but see *United States* v. *Knudsen,* 320 F. Supp. 878 (W.D. Wis. 1971).

Had there been any evidence offered at the trial which tended to contradict the selective service file's representation that Mr. Harris had failed to report, we would be alarmed about his demand for the right to confront the witness on this issue. However, as the record stands in this case, the selective service file was admissible to establish a prima facie case under 28 U.S.C. § 1732 and § 1733. See also Rule 27, Federal Rules of Criminal Procedure. The letter of February 17, 1969, which declared that Mr. Harris had failed to report, was in response to a letter addressed to the Elgin State Hospital from the local board on February 5, 1969, in which inquiry was made as to whether the registrant reported for the purpose of performing civilian work. We believe that this correspondence, including the letter of February 17, 1969, to which the appellant objects, was received by the board in the ordinary course of business.

We find here no deprivation of either due process or fair play, and in this sense the case is akin to the recent decision of the United States Supreme Court in *Richardson* v. *Perales,* ..... U.S. ..... (decided May 3, 1971), where a physician's report showing his medical findings was re-

ceived into evidence with the court noting (at p. 13 of the slipsheet opinion):

> ". . . the claimant has not exercised his right to subpoena the reporting physician and thereby provide himself with the opportunity for cross-examination of the physician."

Mr. Harris also argues that there was no basis in fact for his being denied a ministerial classification. The record contradicts this argument. In responding to his board's selective service questionnaire, Mr. Harris stated that he spent only five hours per week in teaching and preaching the principles of religion. The superior of his church sent a letter dated January 22, 1965, which asserted that Mr. Harris "plans" to be a full time minister. Under *Estep* v. *United States*, 327 U.S. 114 (1946), and *United States* v. *Phifer*, ... F.2d ..... (7th Cir., decided February 17, 1971), it is clear that there was a basis in fact for the board's determination that Mr. Harris was not entitled to a IV-D classification.

The appellant also contends that his classification was illegal because three members of his local board were ministers and represented faiths different from his own. Aside from Mr. Harris' contention in this regard, there is no proof in the record tending to support the accuracy of his claim. This issue was not raised before the appeal board, and the government urges that Mr. Harris cannot now attack the validity of the classification on this ground. *Cox* v. *United States*, 332 U.S. 442, 454 (1947). However, even if the issue were deemed to be properly raised in this court, there are no racial or religious restrictions upon the composition of local boards under 50 App. U.S.C. § 460 and, thus, this collateral attack upon the board's composition must fail. See *United States* v. *Richmond*, 274 F. Supp. 43 (C.D. Cal. 1967). The court

of appeals for this circuit recently considered a similar challenge in *Wright* v. *Ingold,* ..... F.2d ..... (7th Cir., decided May 18, 1971), where the court noted at page 6 of the slipsheet opinion:

> "Nor do we believe that induction orders affecting the members of one race are void as a matter of law because the board was composed of members of a different race."

Mr. Harris also urges that there was no basis in fact for his classification because he was medically unfit for induction. He bases this, in part, on the fact that at the time of his physical examination, he reported that he was suffering from a defective spine, a trick knee, and from flat feet. He further claims that after these physical defects were noted, other persons being examined were sent along a different route than he was directed to follow. This contention by the appellant has an almost frivolous quality to it since the actual medical conclusion reached at the completion of his examination, and certified to by the examining physician, was that he was qualified for military service. We find Mr. Harris' contention in this regard totally devoid of any semblance of merit.

We are urged by the appellant to set aside his conviction because the direction to report for civilian work violated the 13th amendment and the 5th amendment of the Constitution of the United States. We give no credence to this argument. *Jacobson* v. *Massachusetts,* 197 U.S. 11, 29 (1905); *Clay* v. *United States,* 397 F.2d 901, 912 (5th Cir. 1968), vacated and remanded on other grounds *sub. nom. Giordano* v. *United States,* 394 U.S. 310 (1969); *United States* v. *Holmes,* 387 F.2d 781, 785 (7th Cir. 1967), cert. denied 391 U.S. 936 (1968).

Although several other grounds for reversal are also advanced by the appellant, we are persuaded that the judgment of the district court must be and hereby is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA

vs.

WILLIE CLYDE HARRIS

NO. 66 CR 373
Vio: Title 50 Appendix, United States Code, Section 462

The JUNE 1969 GRAND JURY charges:

On or about February 10, 1969, at Elgin, in the Northern District of Illinois, Eastern Division,

WILLIE CLYDE HARRIS,

defendant, being a male person who was required to and did register under the provisions of the Universal Military Training and Service Act, and who duly became a registrant at Local Board No. 48, Chicago, Illinois, and was

duly classified in Class I-O, and was ordered by said Local Board to report to Elgin State Hospital, Elgin, Illinois, to perform civiiian work contributing to the maintenance of the national health, safety, or interest, then and there knowingly did neglect, fail, and refuse to report to Elgin State Hospital, Elgin, Illinois; in violation of Title 50 Appendix, United States Code, Section 462.

A TRUE BILL:

.....

FOREMAN

.....

UNITED STATES ATTORNEY
HMH:el

APPENDIX C

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

REGULATIONS CITED

Sec. 1626.41 Appeal stays induction.

The local board shall not issue an order for a registrant to report for induction either during the period afforded the registrant to take an appeal to the appeal board or during the period such an appeal is pending. Any order to report for induction which has been issued during either of such periods shall be ineffective and shall be cancelled by the local board. Whenever an appeal to the appeal board has been taken by a person entitled to do so, any order to report for induction which has previously been issued to the registrant shall be ineffective and shall be cancelled by the local board.

Sec. 1660.20(d)

If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in Sec. 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

Sec. 1626.61(a)(b)

(a) When either the Director of Selective Service of the State Director of Selective Service deems it to be in the national interest or necessary to avoid an injustice,

he may, at any time request an appeal board to reconsider any determination made by it, stating his reasons for requesting such reconsideration. Upon receiving such a request, an appeal board will reconsider its determination in any case.

(b) At any time before the registrant is mailed an Order to Report for Induction (SSS Form 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form 153) the government appeal agent, if he deems it to be in the national interest or necessary to avoid an injustice, may prepare and place in the registrant's file a recommendation that the State Director of Selective Service either request the appeal board to reconsider its determination or appeal to the President. The registrant's file shall then be forwarded to the State Director of Selective Service. As soon as the State Director of Selective Service has acted upon the recommendation of the government appeal agent he shall advise the local board and, if he determines neither to request the appeal board to reconsider its determination nor to appeal to the President, he shall return the file to the local board.

Sec. 1626.31

When the local board receives notice of the decision of a case by the appeal board, it shall:

(a) Mail a Notice of Classification (SSS Form No. 110) to the registrant, mail a Classification Advice (SSS Form No. 111) to every person who has on file a written request for the current deferment of the registrant, and enter upon each such form mailed the record of the vote of the appeal board as follows: "Vote of appeal board—Yes ..... No ....."

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No. 71-400

In the Supreme Court of the United States

OCTOBER TERM, 1971

WILLIE CLYDE HARRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully failing to report for civilian work in lieu of induction, in violation of 50 U.S.C. App. 462(a). He was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. 1-7).

The essential facts are not in dispute. Petitioner registered with his local board on September 23, 1964, and indicated that he was a conscientious objector. He was mailed the Special Form for Conscientious Objectors (SSS Form 150), which he completed and returned to the board on October 28, 1964. In the

form, petitioner stated that he was a duly ordained minister of Jehovah's Witnesses. On January 1, 1965, he was placed in Class I-A-O.

On being notified of this classification, petitioner wrote to his local board on January 30, 1965, asking that he be afforded a personal appearance "because I am a Jehovah's Witness, and I would like to have my classification changed to that of a Minister, which is classification IV–D" (see Appendix A, *infra*, p. 11). He was mailed a Special Illinois State Form for those claiming ministerial status, which he completed and returned to the board on February 23, 1965. In the form, he stated that he had been ordained a minister of the Jehovah's Witnesses at the age of 17; that the Chicago Woodlawn Unit, with which he was associated, had 140 members, all ordained ministers; that he was an assistant Bible Study Conductor and spent approximately five hours a week preaching and teaching the principles of his religion; and that he spent approximately 34 hours a week engaged in secular activities not related to his ministerial duties. The board also received a letter from the Congregation Servant of the Chicago Woodlawn Unit (Appendix B, *infra*, p. 13). It stated that "[l]ike all of Jehovah's Witnesses, [petitioner's] ministerial activities has [*sic*] mainly been from door-to-door," but added: "There can be no question as to his * * * determination to preach and live a Christian life. His motive is genuine and sincere. He plans to be a *full time* Minister, a Pioneer for life" (emphasis in original).

On March 16, 1965, the local board reopened petitioner's classification and granted him a personal appearance. After talking with petitioner, the board concluded that the information he had submitted did not entitle him to a ministerial exemption; it voted to retain him in Class I-A-O.

Petitioner then took an appeal to the State Appeal Board, and, on August 3, 1965, pursuant to the procedures then in effect (50 U.S.C. App. (Supp. III) 456 (j)), the conscientious objector claim was referred to the Department of Justice for its review and recommendation. More than two years elapsed before the Department acted; on February 15, 1968, it recommended that petitioner be placed in Class I–O as a conscientious objector.

Petitioner's local board mailed to his original address a copy of the Department recommendation on February 19, 1968, notifying him at the same time that he had 30 days to reply to the recommendation.[1] This communication was not returned to the local board and no response was received from petitioner within the 30-day period. On April 18, 1968, the State Appeal Board classified petitioner I–O, and notice of this classification was mailed to his original address.

The local board then began to process petitioner for a civilian work assignment in lieu of induction. On

[1] On November 21, 1967, the local board had been notified by petitioner of an address change. It is agreed that the board's failure to mail the Department's recommendation to this new address was the result of an inadvertent oversight by the clerk of the board (Pet. 3).

April 29, 1968, it mailed him a current information questionnaire, also directed to his original address. This letter was returned unopened, with the notation on the envelope "not here, try 8657 Halsted." Letters were then mailed to persons whom petitioner had indicated would know his current address; the responses stated that petitioner was residing at 8739 So. Halstead Street, Chicago, Illinois. A current information questionnaire was then mailed to that address on May 31, 1968; it indicated that petitioner was classified I–O; petitioner completed and returned this form on June 12, 1968.

Petitioner was ordered to report for his Armed Forces physical examination on June 24, 1968. He complied with that order and was found physically acceptable. Thereafter, on August 1, 1968, he was mailed SSS Form No. 152 (Special Report for Class I–O Registrants), asking that he list three preferences of approved civilian work. He returned this form without listing any type of work, and attached a handwritten note stating "I deeply appreciate the provision you have extended to me. But because I am a dedicated baptized Christian I can not accept" (see Appendix C, *infra*, p. 14).

An invitation was then extended to petitioner, pursuant to 32 C.F.R. 1660.20(c), to meet with a representative of the State Director and members of the board on November 19, 1968, to discuss possible types of civilian work. The meeting took place on that date; the minutes (see Appendix D, *infra*, pp. 15–16) reflect that "[t]he purpose of the meeting was explained to

the registrant," that he then refused to look at the approved list of possible civilian work on the ground that such work "would be a compromise" of his position as a Jehovah's Witnesses' minister, and that he "would not compromise with the government." No agreement was reached.

The local board then determined that petitioner should be assigned to institutional work at the Elgin State Hospital. This was subsequently approved by the State Director, and, on January 22, 1969, he was ordered to report to the local board on February 3, 1969, for his assignment of employment. Petitioner failed to comply with this order. On February 5, 1969, he notified the board that he would not comply and again requested a ministerial classification. He was told to report to Elgin State Hospital on February 10, 1969, but he refused to do so. The present indictment and conviction followed, and the court of appeals affirmed (Pet. App. 1–7).

1. Petitioner contends here that because the board mistakenly mailed the Department of Justice recommendation, favoring a I–O classification, to the wrong address, he was deprived of an opportunity to respond thereto, and thus his exemption claims were unfairly considered by the State Appeal Board. Under this Court's decision in *Gonzales* v. *United States*, 348 U.S. 407, it is, of course, now well settled that a copy of the Department recommendation is generally to be furnished to the registrant and he is to be afforded an opportunity to submit a written reply to it. While that procedure was not followed in this case due to an over-

sight by the clerk of the board of petitioner's change in address, we think that the court below properly concluded that no prejudice resulted from the failure to provide petitioner with a copy of the recommendation in the circumstances of this case; there is thus no cause for further review by this Court.

Here, unlike *Gonzales* and the other cases on which petitioner relies (Pet. 6–8), the Department's recommendation was favorable to petitioner. It stated that he was entitled to conscientious objector status, and the State Appeal Board classified him I–O. This was the exemption that petitioner had originally sought from his local board.

Petitioner argues, however, that, because he did not receive a copy of the recommendation, he was deprived of an opportunity to provide new information to the State Appeal Board in support of his separate ministerial claim. But, as pointed out by the court below (Pet. App. 3), the Department did "not purport to pass on that [claim]." Indeed, it could not do so; for, by the terms of the statute then in effect,[2] it was strictly limited to reviewing only conscientious objector claims. See 50 U.S.C. App. 456(j); 32 C.F.R. (1967 ed.) 1626.25; cf. *Witmer* v. *United States,* 348 U.S. 375. And, while *Gonzales* and its progeny recog-

[2] The procedure for securing an advisory recommendation of the Department was eliminated by the Military Selective Service Act of 1967, 50 U.S.C. App. (Supp. IV) 456(j), essentially because—as this case demonstrates—it generally took an extremely long time for the Department to complete its investigation.

nize the registrant's right to reply in writing to the position that the Department takes with respect to the requested I–O classification, those decisions clearly do not establish a procedure that permits the registrant to use such a response solely "to buttress" an *unrelated* claim "with supporting information before the Appeal Board [makes] its final decision" (Pet. 7).

Consideration by the State Appeal Board of all claims other than the one premised on conscientious objection was, at the time of petitioner's administrative appeal, specifically confined by regulation to the "* * * information * * * contained in the record received from the local board * * *" (32 C.F.R. (1967 ed.) 1626.24(b)). Thus, whatever information petitioner wanted "to add" (Pet. 6) to bolster his ministerial claim could not properly have been considered on this administrative appeal.

Petitioner could, of course, have attached "to his appeal a statement specifying the matters in which he [believed] the local board erred, * * * [directing] attention to any information in [his] file which he [believed] the local board * * * failed to consider or to give sufficient weight, and * * * [setting] out in full any information which was offered to the local board and which the local board failed or refused to include in [his] file." See 32 C.F.R. (1967 ed.) 1626.12; *Gonzales* v. *United States, supra,* 348 U.S. at 414–415. This he did not do. His claim of prejudice on the ground that, at some later date, he was deprived of an opportunity to furnish "more information in support

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of his [ministerial] claim" (Pet. 6) is therefore not well taken.

2. Nor do we think that petitioner suffered any prejudice because the notice of his I–O classification was mailed to the wrong address. See *United States ex rel. McCarthy* v. *Cook*, 225 F. 2d 71 (C.A. 3), certiorari denied, 350 U.S. 937. His assertion that he was thereby "led * * * to believe that he was being ordered to report for civilian service while still classified I–A–O and with an appeal pending" (Pet. 9–10) is belied by the record.

After the board learned of petitioner's new address, it mailed to him a Current Information Questionnaire (SSS Form 127) on May 31, 1968, which noted that he was in Class I–O. This was received by petitioner, completed and returned to the board on June 12, 1968. A similar form was mailed to him on July 9, 1968, also indicating that he had been classified I–O, and it was completed by petitioner and returned to the board on July 17, 1968. In addition, petitioner received the "Special Report for Class I–O Registrants" (SSS Form No. 152), instructing him to select three types of approved civilian work. He returned this form without completing it, attaching a letter stating that he could accept no civilian work because to do so "would be comprimising [sic] my belief" (see Appendix C *infra*, p. 14). He was then afforded an opportunity to meet with the board to discuss a possible civilian work assignment, pursuant to 32 C.F.R. 1660.20(c), and, on that occasion, "the purpose of the

meeting was explained to [him]" (see Appendix D *infra*, p. 15). It is, therefore, inconceivable that petitioner, a high school graduate, remained unaware that he had been reclassified 1-O by the Appeal Board "until the day of trial" (Pet. 11).

Moreover, the events recited above all occurred well before petitioner was mailed an order to report for civilian work on January 22, 1969. Thus, to the extent that he had additional evidence supporting his ministerial claim, he had ample opportunity to present it to the board;[2] if a *prima facie* case had been made, the board would have been obliged to reopen his classification. See *Mulloy* v. *United States*, 398 U.S. 410. No new information was submitted, however; even now, petitioner asserts only that as he "matured he would begin to assume a more active adult role in his congregation of Jehovah's Witnesses. Consequently, his ministerial teaching, preaching and proselytic activities would become more similar to that which the Local Board would characterize as a vocation" (Pet. 11).

3. In sum, petitioner claims that he never received certain communications from the local board due to an inadvertant mistake in addressing the envelopes. While such clerical errors are not to be condoned, they inevitably occur. Where, as here, it is clear that

[2] As pointed out by the court below (Pet. App. 5), on the basis of the information petitioner did submit to the local board, there was clearly a basis in fact for the denial of his ministerial claim. See p. 2 *supra*.

the error did not result in any material prejudice to the registrant, we think that it is inappropriate to disturb the decision below. See *Knox* v. *United States*, 200 F. 2d 398, 401 (C.A. 9); *United States* v. *Chaudron*, 425 F. 2d 605 (C.A. 8); *Edwards* v. *United States*, 395 F. 2d 453 (C.A. 9). Essentially, petitioner's claim of prejudice comes down to this: that he was—because of certain assumptions he says he made—deprived of an opportunity to submit additional evidence to the local and appeal boards supporting a ministerial claim. The procedural irregularities involved here, however, did not erect any barrier to such a submission. As indicated above, petitioner had ample opportunity after he had been located by the board to tender any new information he might have had. His failure to do so should not now be excused because hindsight reveals a clerical error from which no real prejudice resulted.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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[4] Petitioner's argument before this Court was not made in his motion for acquittal before the district court or in his principal brief before the court of appeals. His claim of prejudice on the basis of the erroneous mailings was first advanced in his reply brief in the court of appeals (Pet. App. 2).

APPENDIX A

CHICAGO, ILL., *January 30, 1965.*

TO WHOM IT MAY CONCERN: My name is Willie C. Harris, my selective service number is 11–48–46–127. I am registered under Local Board No. 48.

According to the notice of classification, I was classified as a I–A–O. It was stated also in the classification notice that I have the choice to a personal appeal. I wish to exercise this choice. I wish to do so, because I am a JEHOVAH'S WITNESS, and I would like to have my classification changed to that of a Minister, which is classification IV–D.

I was to have brought a letter from my Congregation Servant, to state this fact, but due to my own negligence I did not. I wish to ask your forgiveness for this oversight of mine.

According to Section 5D Selective Training and Service Act of 1940; "Regular or duly ordained ministers of religions shall be exempted from training and service (but not from registration) under this act.

I would like to be placed in class IV–D in accordance with Volume III, opinion no 14, National Headquarters, Selective Service System, November 2, 1942; which stated that JEHOVAH'S WITNESSES, may be placed in this class. As a JEHOVAH'S WITNESS, I have a commission and that is to preach the "Good News of God's Kingdom" to all person's of the World. (Matt. 24:14). This is not a commission I thought of myself or that I got from some friend of mine, but on the contrary, It is commission from GOD and this was stated at Isaiah 61:1,2. It explains

why GOD, has followers on earth today and what these followers must do. I recognize the WATCH-TOWER BIBLE and TRACT SOCIETY of Brooklyn, New York as the governing body of JEHOVAH'S WITNESSES, because they supply JEHOVAH'S WITNESSES, with all Bible Literature.

Many persons of today think that because JEHOVAH'S WITNESSES, don't go to College or School for ministry that the Witnesses are not Ministers. We take into account JESUS, himself. He didn't go to school to be a minister because he had a commission from GOD to preach the "Good News". And today JESUS, has followers on earth and these followers have the same commission as JESUS. The scriptures at John 7:15,16 and 1 Cor. 1:26–29; brings out that his followers do not need a school certificate to preach the "Everlasting Good News of GOD'S Kingdom."

So in humble thanks to you for all the trouble I have caused you.

I remain your Obedient Servant,

WILLIE C. HARRIS.

APPENDIX B

WOODLAWN CONGREGATION,
Chicago 37, Ill., January 22, 1965.

TO WHOM IT MAY CONCERN: This is to acknowledge that Willie Harris, is an associate of the Chicago Woodlawn Unit of Jehovah's Witnesses, which unit is operating under the direction of the Corporate and Parent Organization, The Watchtower Bible and Tract Society, Inc. of Brooklyn, New York.

Willie Harris, has been an associate with the Local Unit for two (2) years. He was baptized as an ordained Minister, November 11/63. Since that time, he has served zealously as a Minister and Preacher of "this good news of the Kingdom." Like all of Jehovah's Witnesses, his ministerial activities has mainly been from door-to-door.

Willie Harris, enjoys the good will and esteem of all of associate publishers. As the Overseer or Congregation Servant, I have observed Willie Harris, as genuine and sincere. Willie Harris's family background is Christian. His mother and sister are also dedicated and baptized as Jehovah's Witnesses.

There can be no question as to his (Willie Harris) determination to preach and live a Christian life. His motive is genuine and sincere. He plans to be a *full time* Minister, a Pioneer for life.

Sincerely yours,

MACEO A. BYRD.

APPENDIX C

CHICAGO, ILL., *August 22, 1968.*

DEAR SIR: I deeply appreciate the provision you have extended to me. But because I am a dedicated baptized Christian I can not accept because of what the Bible teaches and my own personal opinion that this would be comprimising my belief and I can not do this. In the early days the first century Christian did not comprimise and I myself can do no less. I thank you for all services rendered and I'm sorry that this letter is late.

WILLIE C. HARRIS.

APPENDIX D

LOCAL BOARD No. 48,
SELECTIVE SERVICE SYSTEM,
Chicago, Ill., November 19, 1968.

Re: 11-48-46-127—Harris, Willie Clyde

Pursuant to 1660.20(c) of Current Selective Service Regulations, a meeting was held in the office of this Local Board located at 2355 W. 63rd Street, Chicago, Illinois. Present were: Mrs. Hertha Maas, Division Supervisor, the direct representative of the Illinois State Director, Selective Service System; Mr. Curtis Stillwell, Chairman; Rev. C. V. Johnson, Mr. Frank Baxter Sr. and Mr. Richard L. Denzy, members.

The purpose of the meeting was explained to the registrant who was sworn in by Mr. Stillwell, Board Chairman. The registrant was asked if he cared to look at the list of approved agencies whereat he might perform civilian work in lieu of induction. He said, "No" that this would be a compromise because he feels that he is a minister. He was asked if he cared to perform civilian work in lieu of induction. He does not. He said that this would compromise his belief as a christian and he would not compromise with the government.

In view of the fact that the registrant came to no agreement with the board as to the type of civilian work he should perform in lieu of induction. The members unanimously decided that institutional work at Elgin State Hospital, 750 South State Street, Elgin, Illinois would be an appropriate type of work for him to perform in lieu of induction into the Armed

Forces. The members also authorized the issuance of the Civilian Work Order (SSS Form 153) if the type of work is approved by the Director of Selective Service.

The meeting convened at 6:35 P.M. and adjourned at 7:00 P.M.

MRS. RUBY HILL,
Executive Secretary.

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